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BRICKMAN, ERIC S. ELICE, DES McANUFF, DSHT, INC.
and DODGER THEATRICALS, LTD.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DONNA CORBELLO, an individual

Plaintiff,

v.

THOMAS GAETANO DEVITO, an
individual; FRANKIE VALLI, an
individual; ROBERT J. GUADIO, an
individual; MARSHALL BRICKMAN,
an individual; ERIC S. ELICE a/k/a/
RICK ELICE, an individual; DES
McANUFF, an individual; DSHT, INC.
(formerly, DODGER STAGE HOLDING
THEATRICALS, INC.), a Delaware
corporation; and DODGER
THEATRICALS, LTD., a New York
corporation,

Defendants.

CASE NO.: 2:08-cv-00867-RCJ-PAL

ANSWER TO FIRST AMENDED
COMPLAINT BY DEFENDANTS
FRANKIE VALLI, ROBERT J.
GAUDIO, MARSHALL BRICKMAN,
ERIC S. ELICE, DES McANUFF,
DSHT, INC. and DODGER
THEATRICALS, LTD.

1 Defendants FRANKIE VALLI, ROBERT J. GAUDIO, MARSHALL
2 BRICKMAN, ERIC S. ELICE, DES McANUFF, DSHT, INC. and DODGER
3 THEATRICALS, LTD. (collectively "Answering Defendants"), for themselves and
4 for no other defendant, in response to the First Amended Complaint ("Complaint") of
5 Plaintiff Donna Corbello ("Plaintiff"), admits, alleges and denies as indicated
6 specifically below.

7 **Preliminary Statement Concerning the Complaint**

8 Preliminarily, answering Defendants aver that the 181-paragraph 66-page
9 Complaint is neither "simple, concise [nor] direct" as Fed. R. Civ. P. 8 requires. It is
10 replete with complex, compound, discursive and run-on sentences, many of which a)
11 assume other facts and legal conclusions, b) imply facts in a vague, indirect and
12 unclear manner, c) incorporate and assume other allegations, d) offer opinions and
13 evaluations about alleged facts, and e) state legal conclusions, interweave legal
14 conclusions with statements of fact and opine on the legal significance of various
15 documents -- often in an argumentative rather than factual way. The Complaint
16 consists of a substantial number of irrelevant contentions that go well beyond a
17 concise statement of the requisite elements of its claims. As a result, it is virtually
18 impossible for Answering Defendants to provide a straight-forward answer to the
19 Complaint. Nevertheless, Answering Defendants have made a good faith attempt to
20 respond to Plaintiff's factual allegations to the extent they are clear and reasonably
21 susceptible to admission or denial. But plaintiff's discursive, multiple compound,
22 vague, implied and argumentative contentions place an unfair burden on Defendants
23 and their ability to precisely and cleanly admit or deny or otherwise answer the
24 expansive allegations of the Complaint. There is simply too much ambiguity,
25 confusion, uncertainty and vagueness as to what the allegations in the complaint
26 specifically mean. This objection applies to the Complaint generally and to each of its
27 lengthy paragraphs. It is incorporated into each of Defendants' responses below.
28

BASIS FOR FEDERAL JURISDICTION

1
2 1. Deny for lack of sufficient knowledge or information each allegation
3 contained in Paragraph 1 of the Complaint.

4 **THE PARTIES**

5 2. Deny for lack of sufficient knowledge or information each allegation
6 contained in Paragraph 2 of the Complaint.

7 3. Deny that the musical production JERSEY BOYS used and/or adapted
8 Plaintiff's alleged unpublished, biographical work regarding Tommy DeVito
9 ("DeVito") and the pop group, The Four Seasons (the "Work"). Deny for lack of
10 sufficient knowledge information each remaining allegation contained in Paragraph 3
11 of the Complaint.

12 4. Admit the first sentence of Paragraph 4 of the Complaint. Admit the
13 allegations in the third sentence of Paragraph 4 of the Complaint, but note that the
14 partnership operates from an office in Santa Monica and not Beverly Hills. Except as
15 expressly admitted, deny each remaining allegation contained in Paragraph 4 of the
16 Complaint.

17 5. Admit the first sentence of Paragraph 5 of the Complaint. Admit the
18 allegations in the third sentence of Paragraph 5 of the Complaint, but note that the
19 partnership operates from an office in Santa Monica and not Beverly Hills. With
20 regard to the fourth sentence of Paragraph 5 of the Complaint, admit that the
21 Complaint sometimes refers to Valli and Gaudio collectively as "The Four Seasons
22 Partnership." Except as expressly admitted, deny each remaining allegation
23 contained in Paragraph 5 of the Complaint.

24 6. Admit that Defendant Marshall Brickman ("Brickman") is domiciled in
25 New York, is a musician, writer and screenwriter, and co-authored the *libretto* for
26 JERSEY BOYS with Defendant Eric S. Elice ("Elice"). Except as expressly admitted,
27 deny each remaining allegation contained in Paragraph 6 of the Complaint.

28 7. Admit that Elice is domiciled in New York, New York, is a writer,

1 producer, performer and creative consultant who co-authored the *libretto* for JERSEY
2 BOYS with Brickman. Except as expressly admitted, deny each remaining allegation
3 contained in Paragraph 7 of the Complaint.

4 8. Admit that Defendant Des McAnuff ("McAnuff") is domiciled in New
5 York, New York is a founding member of Defendant Dodger Theatricals, Ltd.
6 ("Dodge Theatricals"), has won awards directing Broadway musical productions and
7 directed JERSEY BOYS. Except as expressly admitted, deny each remaining
8 allegation contained in Paragraph 8 of the Complaint.

9 9. Admit that Defendant DSHT, Inc. ("DSHT") is a Delaware corporation
10 with an office in New York. Defendants aver that the Agreement referred to in
11 Paragraph 9 of the Complaint speaks for itself and note that DSHT is not a signatory
12 to said Agreement. Except as expressly admitted, deny each remaining allegation
13 contained in Paragraph 9 of the Complaint and deny all inferences and conclusions
14 and descriptions of said agreement that are contained in paragraph 9.

15 10. Admit that Dodger Theatricals is a New York corporation and is a
16 producer of Broadway and off-Broadway musicals, including JERSEY BOYS.
17 Further admit that Dodger Theatricals is responsible for producing JERSEY BOYS.
18 Defendants aver that the Agreement referred to in Paragraph 10 speaks for itself.
19 Except as expressly admitted, deny each remaining allegation and characterization
20 contained in Paragraph 10 of the Complaint and deny all inferences and conclusions
21 and descriptions of said agreement that are contained in paragraph 10. Admits that
22 Dodger Theatricals and other parties are responsible for productions and performances
23 of *Jersey Boys* including a production in the District.

24 **NATURE OF THE ACTION**

25 11. Deny that DeVito's license to Valli and Gaudio that, among other things,
26 transferred rights in the Work, was void *ab initio*. Further deny for lack of sufficient
27 knowledge or information each remaining allegation contained in Paragraph 11 of the
28 Complaint, except admit that the Complaint purports to state a claim for declaratory

1 relief.

2 12. Deny for lack of sufficient knowledge or information each allegation
3 contained in Paragraph 12 of the Complaint, except admit that the Complaint purports
4 to state claims against DeVito for an accounting, unjust enrichment, breach of implied
5 covenant of good faith and fair dealing, constructive fraud, fraudulent concealment,
6 fraudulent conversion of profits and/or royalties and conversion of Plaintiff's
7 purported 50% ownership interest in the Work.

8 13. Deny that the license from DeVito to Valli and Gaudio that, among other
9 things, transfers, rights in the Work, was void *ab initio*; deny that various licenses or
10 transfers of rights by Valli and Gaudio were void and invalid under 17 U.S.C. §
11 201(d)(2); deny that Valli, Gaudio, DSHT and Dodger Theatricals need any license
12 from Plaintiff or that JERSEY BOYS uses or has adapted the Work. Deny for lack of
13 sufficient knowledge or information each remaining allegation contained in Paragraph
14 13 of the Complaint, except admit that the Complaint purports to state a claim for
15 declaratory relief against Valli, Gaudio, DSHT and Dodger Theatricals.

16 14. Deny each allegation contained in Paragraph 14 of the Complaint to the
17 extent that they allege facts, and deny for lack of knowledge or information sufficient
18 to the extent that they attempt to characterize the nature of the Complaint which must
19 speak for itself and stand on its own.

20 15. Deny each allegation contained in Paragraph 15 of the Complaint to the
21 extent that they allege facts, and deny for lack of knowledge or information sufficient
22 to the extent that they attempt to characterize the nature of the Complaint which must
23 speak for itself and stand on its own.

24 **PERSONAL JURISDICTION AND VENUE**

25 16. Deny for lack of sufficient knowledge or information each allegation
26 contained in the first sentence of Paragraph 16 of the Complaint. Deny each
27 remaining allegation contained in Paragraph 16 of the Complaint.

28 17. Deny for lack of sufficient knowledge or information each allegation

1 contained in the first sentence of Paragraph 17 of the Complaint. Deny each
2 remaining allegation contained in Paragraph 17 of the Complaint, except admit that
3 the Complaint purports to state a basis for venue over these Answering Defendants.

4 **STATEMENT OF FACTS**

5 18-36 Deny for lack of sufficient knowledge or information each allegation
6 contained in Paragraphs 18 -36 of the Complaint.

7 37. Admit that by the end of 2006, JERSEY BOYS had become a popular
8 and critical success and won Tony Awards. Deny for lack of sufficient knowledge or
9 information each remaining allegation contained in Paragraph 37 of the Complaint. As
10 to who "recouped [their] initial investment" this allegation invades confidential and
11 proprietary business information which Defendants will not provide without an
12 appropriate confidentiality agreement and order and on that basis, denies this
13 allegation.

14 38-42 Deny for lack of sufficient knowledge or information each allegation
15 contained in Paragraphs 38-42 of the Complaint.

16 43. Admit that the writers of the libretto (aka the "book") (i.e., Elice and
17 Brickman) of JERSEY BOYS have seen a version of a biography of DeVito; that
18 DeVito was financially connected to JERSEY BOYS and that DeVito received
19 royalties from the exploitation of JERSEY BOYS. Except as expressly admitted,
20 deny each remaining allegation contained in Paragraph 43 of the Complaint.

21 44. Deny generally each allegation contained in Paragraph 44 of the
22 Complaint. But, admit that Brickman and Elice relied on interviews with Bob Gaudio
23 and Frankie Valli and others. Admit that Brickman and Elice relied on interviews with
24 others for Nick Massi's side of the story. Admit that Answering Defendants (except
25 for Valli and Gaudio and DSHT and Dodger Theatricals) saw a copy of a biography of
26 Tommy DeVito, but all deny that they used any protected or copyrightable materials
27 from it. Deny for lack of sufficient knowledge or information whether or when the
28 quotation attributed to *Wikipedia* was published or reported in a *Wikipedia* article

1 referred to in this Paragraph. Deny for lack of sufficient knowledge or information
2 what Christian Hoff or Devon May said, but deny that either Christian Hoff or Devon
3 May had anything to do with writing *Jersey Boys* and aver that if the Work had been
4 seen by Mr. Hoff “as background research” or by Mr. May “as an educational tool, to
5 get to know who Tommy was” there would be nothing at all improper about that and
6 it would not constitute an infringement of anyone’s copyright in the Work. Deny for
7 lack of sufficient knowledge or information whether the persons quoted by various
8 publications and websites referred to in this Paragraph 44 actually said what they are
9 quoted to have said or whether the publications or websites referred to actually
10 published the statements attributed to these individuals. Admit that Defendant DeVito
11 received payments from the producers of *Jersey Boys*.

12 45-4 Deny for lack of sufficient knowledge or information each allegation
13 contained in Paragraph 45 of the Complaint.

14 48. Deny for lack of sufficient knowledge or information each allegation
15 contained in Paragraph 48 of the Complaint. Deny for lack of sufficient knowledge or
16 information what transpired with “negotiations with DeVito’s counsel” or what “facts
17 emerged” for whom and regarding *Jersey Boys* or what the Chicago Tribune reported
18 regarding *Jersey Boys*. Whether or not Paragraph 48 of the Complaint correctly
19 reports what the Chicago Tribune published, “the idea of using all three of them
20 [Valli, DeVito, Gaudio] as narrators, each telling their version of the group’s history at
21 different points in the show” is not an original or novel or copyrightable or protectible
22 idea that can be a proper subject of this copyright claim or any copyright claim. It is
23 an “idea” and not an expressive feature of an historical or biographical work. Whether
24 or not “DeVito was already writing a memoir . . . especially on how the Seasons tap-
25 danced around the Outfit [mob] members who controlled many of the venues in which
26 they played, and whose loans underwrote DeVito’s lifestyle” this information is a
27 matter of historical fact which *anyone* may write about without anyone else’s
28 permission – because copyright does not protect fact or ideas. Admit that Exhibit 27 is

1 a correct copy of certain excerpts from the *Jersey Boys Book*, but plaintiff takes the
2 quoted statements out of context and draws conclusions of law and fact from them that
3 are not justified or warranted; and draws conclusions about timing and activities that
4 are not true and which Answering Defendants deny. As to the quotation attributed to
5 Des McAnuff, the decision or idea of rejecting a “traditional musical structure” –
6 whatever that may be – is not an original or protectable idea and cannot be the basis
7 for a copyright infringement claim. Answering Defendants further deny all the
8 implications and conclusions, implied or otherwise, that Plaintiff wishes to draw from
9 the allegations contained in Paragraph 48 and from all of the quotations cited therein:
10 Among other things, “the concept of a biographically inspired production” is not the
11 exclusive or proprietary idea of anyone including DeVito or Plaintiff; no one can own
12 such a “concept” and it cannot form the basis of a copyright claim in this or in any
13 action. Answering Defendants aver that Plaintiff uses the quotations incorrectly and
14 out of context in order to draw conclusions and implications from them that are
15 unjustified and unwarranted and to distort the account of how the *Jersey Boys* was in
16 fact developed. The allegation that “a couple of sequences on their treatment were
17 clearly inspired by this autobiography” cannot support any copyright claim, since
18 factual, historical, biographical events cannot be owned by anyone, are not protectable
19 by copyright and cannot form the basis for a copyright claim in this or in any action.
20 Whether or not McAnuff was correct about what he is alleged to have said, it is not
21 improper in any way to examine biographies and other factual records and accounts
22 and to be “inspired” by them. Even, assuming that plaintiff’s account of the
23 development of the *Jersey Boys* were correct, which it is not, there is nothing
24 improper about research and it is not an infringement of anyone’s copyright to draw
25 upon facts and biographical information from books, encyclopedia’s, histories,
26 biographies or other available factual materials. Answering Defendants deny
27 Plaintiff’s alleged and implied account of how *Jersey Boys* was developed. In all
28 events, the use of “mob-oriented” subject matter cannot be the basis for a copyright

1 claim – it involves factual and historical information that is not copyrightable and
2 which cannot be the subject of a copyright claim in this or in any action.

3 49. Answering Defendants deny the allegations contained in Paragraph 49 of
4 the Complaint and deny the account of the development of the Jersey Boys that
5 plaintiff alleges and implies in said Paragraph. Plaintiff's allegations in Paragraph 49
6 are nothing more than a recitation of a progression of historical and biographical facts
7 which progress chronologically and which cannot be owned or copyrighted by
8 anyone. They cannot form the basis for a copyright infringement claim. Answering
9 Defendants deny that they infringed any copyright interests of Plaintiff. The parallels
10 and allegations that Plaintiff relies on, even if true, which they are not, are unprotected
11 facts and events that everyone is free to research and write about.

12 50. Deny for lack of sufficient knowledge or information each allegation
13 contained in Paragraph 50 of the Complaint.

14 51. Answering Defendants aver that the August 13, 1999 agreement between
15 DeVito and Valli and Gaudio speaks for itself. Except as averred, deny each
16 allegation contained in paragraph 51 and deny all inferences and conclusions and
17 descriptions of said Agreement that are contained in paragraph 51.

18 52. Answering Defendants aver that the August 13, 1999 agreement between
19 DeVito and Valli and Gaudio speaks for itself. Except as averred, deny each
20 allegation contained in paragraph 52 and deny all inferences and conclusions and
21 descriptions of said Agreement that are contained in paragraph 52. Answering
22 Defendants deny Plaintiffs legal and factual allegations contained in the second, third
23 and fourth sentences of Paragraph 52 of the Complaint. DeVito gave continuing
24 permissions directly to the Answering Defendants and received continuing payments
25 from the producers of Jersey Boys for said permissions.

26 53. Answering Defendants aver that the alleged May 1, 2004 agreement
27 between and among Valli, Gaudio, Brickman, Elice, DSHT (DSHT was not a party to
28 said agreement) and Dodger Theatricals speaks for itself. Except as averred, deny

1 each allegation contained in Paragraph 53 of the Complaint and deny all inferences
2 and conclusions and descriptions of said agreement that are contained in paragraph 53.

3 54. Answering Defendants aver that the May 1, 2004 agreement speaks for
4 itself. Except as averred, deny each allegation contained in Paragraph 54 of the
5 Complaint and deny all inferences and conclusions and descriptions of said agreement
6 that are contained in paragraph 54. Admit that Dodger Theatricals is responsible for
7 the production of Jersey Boys. There have been no customizations and /or translations
8 of the *libretto* for local and foreign venues.

9 55-59 Deny each allegation contained in Paragraphs 55-59 of the Complaint.

10 60. Deny each of the allegations contained in Paragraph 60 of the
11 Complaint but admit that the producers have received substantial revenues from the
12 productions of *Jersey Boys*, from the Cast Recording, and from the *Jersey Boys* book
13 and admit that other plans for other tours are contemplated. Answering Defendants
14 will provide information about such revenues if and when appropriate and proper
15 discovery demands are made, provided that the specific materials sought are otherwise
16 properly discoverable and not subject to any privilege and provided that plaintiff
17 complies with applicable protective orders or confidentiality stipulations. Answering
18 Defendants deny for lack of knowledge or information all allegations in Paragraph 60
19 that pertain to DeVito. Answering Defendants also and further deny all claims against
20 them contained in the last sentence of Paragraph 60 of the Complaint.

21 61. Deny each allegation contained in Paragraph 61 of the Complaint.

22 **COUNT I**

23 62. In response to the allegations contained in Paragraph 62 of the
24 Complaint, Answering Defendants reallege and incorporate herein by reference each
25 admission, allegation and denial hereinabove set forth in Response to Paragraphs 1
26 through 61 of the Complaint.

27 63-73 Deny for lack of sufficient knowledge or information each allegation
28 contained in Paragraphs 63-73 of the Complaint.

74. Deny that the first sentence of Paragraph 74 is a correct statement of the law. Deny for lack of sufficient knowledge or information each remaining allegation contained in Paragraph 74 of the Complaint.

75. Deny that the first sentence of Paragraph 75 is a correct statement of the law. Deny for lack of sufficient knowledge or information each remaining allegation contained in Paragraph 75 of the Complaint.

76. Deny each allegation contained in Paragraph 76 of the Complaint.

77. Deny for lack of sufficient knowledge or information of each allegation contained in Paragraph 77 of the Complaint.

78. Deny that the agreement between DeVito and Valli and Gaudio, in or around August 1999, transferring various rights, was void *ab initio*. Deny for lack of sufficient knowledge or information each remaining allegation contained in Paragraph 78 of the Complaint, except admit that the Complaint purports to state a claim for declaratory judgment against DeVito.

COUNT II

79. In response to the allegations contained in Paragraph 79 of the Complaint, Answering Defendants reallege and incorporate herein by reference each admission, allegation and denial hereinabove set forth in response to Paragraphs 1 through 78 of the Complaint.

80. Admit the allegations in Paragraph 80 of the Complaint.

81-86. Deny for lack of sufficient knowledge or information each of the allegations in Paragraphs 81-86 of the Complaint.

87. Deny for lack of sufficient knowledge or information each allegation contained in Paragraph 87 of the Complaint, except admit that the Complaint seeks an order that DeVito render an accounting to Plaintiff.

COUNT III

88. In response to the allegations contained in Paragraph 88 of the Complaint, Answering Defendants reallege and incorporate herein by reference each admission,

1 allegation and denial hereinabove set forth in response to Paragraphs 1 through 87 of
2 the Complaint.

3 89-98. Deny for lack of sufficient knowledge or information each
4 allegation contained in Paragraphs 89-98 of the Complaint.

5 **COUNT IV**

6 99. In response to the allegations contained in Paragraph 99 of the
7 Complaint, Answering Defendants reallege and incorporate herein by reference each
8 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
9 through 98 of the Complaint; Answering Defendants further reallege and incorporate
10 herein by reference each admission, allegation and denial hereinbelow set forth in
11 response to Paragraphs 105 through 110 of the Complaint.

12 100-102. Deny for lack of sufficient knowledge or information each
13 allegation contained in Paragraphs 100 through 102 of the Complaint.

14 **COUNT V**

15 103. In response to the allegations contained in Paragraph 103 of the
16 Complaint, Answering Defendants reallege and incorporate herein by reference each
17 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
18 though 102 of the Complaint.

19 104-109. Deny for lack of sufficient knowledge or information each
20 allegation contained in Paragraphs 104 through 109 of the Complaint.

21 **COUNT VI**

22 110. In response to the allegations contained in Paragraph 110 of the
23 Complaint, Answering Defendants reallege and incorporate herein by reference each
24 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
25 through 109 of the Complaint.

26 111. Deny for lack of sufficient knowledge or information each allegation
27 contained in Paragraph 111 of the Complaint.

28 112. Deny that JERSEY BOYS was adapted from the Work or that the Work

1 had been referenced and used extensively in connection with JERSEY BOYS. Deny
2 for lack of sufficient knowledge or information each remaining allegation contained in
3 Paragraph 112 of the Complaint.

4 113-114. Deny for lack of sufficient knowledge or information each
5 allegation contained in Paragraphs 113-114 in the Complaint.

6 **COUNT VII**

7 115. In response to the allegations contained in Paragraph 115 of the
8 Complaint, Answering Defendants reallege and incorporate herein by reference each
9 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
10 through 114 of the Complaint.

11 116-118. Deny for lack of sufficient knowledge or information each
12 allegation contained in Paragraphs 116-118 of the Complaint.

13 119. Deny that JERSEY BOYS was derivative of the Work. Deny for lack of
14 sufficient knowledge or information each remaining allegation contained in Paragraph
15 119 of the Complaint.

16 120-122. Deny for lack of sufficient knowledge or information each
17 allegation contained in Paragraphs 120-122 of the Complaint.

18 123. Deny that JERSEY BOYS was adapted from the Work or that the Work
19 had been referenced and used extensively in connection with JERSEY BOYS. Deny
20 for lack of sufficient knowledge or information each remaining allegation contained in
21 Paragraph 123 of the Complaint.

22 124-126. Deny for lack of sufficient knowledge or information each
23 allegation contained in Paragraphs 124-126 of the Complaint.

24 **COUNT VIII**

25 127. In response to the allegations contained in Paragraph 127 of the
26 Complaint, Answering Defendants reallege and incorporate herein by reference each
27 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
28 through 126 of the Complaint.

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1 Complaint, Answering Defendants reallege and incorporate herein by reference each
2 admission, allegation and denial hereinabove set forth in response to Paragraphs 1
3 through 147 of the Complaint.

4 148-150. Deny for lack of sufficient knowledge or information each
5 allegation contained in Paragraph 148-150 of the Complaint.

6 151. Deny each allegation contained in Paragraph 151 of the Complaint.

7 152. Admit that Answering Defendants -- except for Valli and Gaudio and
8 DSHT and Dodger Theatricals -- saw a version of a biography of DeVito. Except as
9 expressly admitted, all Answering Defendants deny each remaining allegation
10 contained in Paragraph 152 of the Complaint.

11 153. Deny for lack of sufficient knowledge or information each allegation
12 contained in Paragraph 153 of the Complaint.

13 154-161. Deny each allegation contained in Paragraphs 154-161 of the
14 Complaint.

15 162. Deny each allegation contained in Paragraph 162 of the Complaint and
16 further aver that Plaintiff has suffered no harm as a result of any conduct by
17 Answering Defendants, or any of them, or at all.

18 163. Deny each allegation contained in Paragraph 163 of the Complaint and
19 further aver that Plaintiff has sustained no injury, loss or damage as a result of any
20 conduct by Answering Defendants, or any of them, or at all.

21 164. Deny each allegation contained in Paragraph 164 of the Complaint and
22 further aver that Plaintiff has not been damaged by Answering Defendants, or any of
23 them, or at all.

24 165-166. Deny each allegation contained in Paragraph 165-166 of the
25 Complaint.

26 167. Deny each allegation contained in Paragraph 167 of the Complaint and
27 further aver that Plaintiff has sustained no damages as a result of any conduct by
28 Answering Defendants, or any of them, or at all.

COUNT XII

168. In response to Paragraph 168 of the Complaint, Defendant realleges and incorporates herein by reference each admission, allegation and denial hereinabove set forth in response to Paragraphs 1 through 167 of the Complaint.

169. Deny each allegation contained in Paragraph 169 of the Complaint.

170. Deny each allegation contained in Paragraph 170 of the Complaint, and further aver that Plaintiff has sustained no damages as a result of any conduct by Answering Defendants, or any of them, or at all.

171. Deny each allegation contained in Paragraph 171 of the Complaint.

172. Deny each allegation contained in Paragraph 172 of the Complaint, and further aver that Plaintiff has sustained no damages as a result of any conduct by Answering Defendants, or any of them, or at all.

COUNT XIII

173. In response to Paragraph 173 of the Complaint, Defendant realleges and incorporates herein by reference each admission, allegation and denial hereinabove set forth in response to Paragraphs 1 through 172 of the Complaint.

174-176. Deny each allegation contained in Paragraph 174-176 of the Complaint.

177. Deny each allegation contained in Paragraph 177 of the Complaint, and further aver that Plaintiff has suffered no harm from Answering Defendants, or any of them, or at all.

178. Deny each allegation contained in Paragraph 178 of the Complaint, and further aver that Plaintiff has suffered no harm from Answering Defendants, or any of them, or at all.

179. Deny each allegation contained in Paragraph 179 of the Complaint, and further aver that Plaintiff has suffered no harm from Answering Defendants, or any of them, or at all.

180. Deny each allegation contained in Paragraph 180 of the Complaint.

181. Deny each allegation contained in Paragraph 181 of the Complaint, and further aver that Plaintiff has suffered no harm from Answering Defendants, or any of them, or at all.

AFFIRMATIVE DEFENSES

Answering Defendants allege the following affirmative defenses without admitting that the affirmative defenses impose upon Answering Defendants the affirmative duty to present evidence or bear the burden of proof.

FIRST AFFIRMATIVE DEFENSE

[Failure to State a Claim]

182. The Complaint and each purported claim therein against Answering Defendants fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

[Licensed Use]

183. Any copying of Plaintiff's Work (which Answering Defendants deny and assume only for the sake of asserting this defense) was pursuant to a license and permission granted, expressly or impliedly, by Thomas DeVito.

THIRD AFFIRMATIVE DEFENSE

[Consent]

184. Any copying of Plaintiff's Work (which Answering Defendants deny but here assume only for the sake of asserting this defense) was consented to by the owner of the appropriate rights in the Work.

FOURTH AFFIRMATIVE DEFENSE

[Waiver]

185. Plaintiff's purported claims and any prayer for relief are barred by waiver.

FIFTH AFFIRMATIVE DEFENSE

[Estoppel]

186. Plaintiff's purported claims and any prayer for relief are barred by the

1 principle of estoppel.

2 **SIXTH AFFIRMATIVE DEFENSE**

3 [17 U.S.C. § 411(a)]

4 187. Plaintiff's purported claims and any prayer for relief are barred and/or
5 limited by the provisions of 17 U.S.C. § 411(a).

6 **SEVENTH AFFIRMATIVE DEFENSE**

7 [17 U.S.C. § 412]

8 188. Plaintiff's purported claims and any prayer for relief are barred and/or
9 limited by the provisions of 17 U.S.C. § 412.

10 **EIGHTH AFFIRMATIVE DEFENSE**

11 [Fair Use]

12 189. Any copying of Plaintiff's Work (which Answering Defendants deny but
13 here assume only for the sake of asserting this defense) constitutes "fair use."

14 **NINTH AFFIRMATIVE DEFENSE**

15 [De Minimis Use]

16 190. Plaintiff's purported claim for relief is barred in whole or in part by the
17 doctrine of de minimis use, to the extent any such use occurred, which Answering
18 Defendants deny but here assume only for the sake of asserting this defense.

19 **TENTH AFFIRMATIVE DEFENSE**

20 [No Use of Copyrightable Subject Matter]

21 191. Any copying of Plaintiff's Work (which Answering Defendants deny but
22 here assume only for the sake of asserting this defense) constitutes a use of facts,
23 ideas, concepts, ordinary expressions or dialogue, *scenes a faire* and/or other elements
24 that are not protected by copyright.

25 **ELEVENTH AFFIRMATIVE DEFENSE**

26 [First Amendment]

27 192. Plaintiff's purported claim for relief is barred in whole or in part because
28 the purported use of Plaintiff's purportedly copyrightable materials constituted a use

1 protected by the First Amendment to the United States Constitution, to the extent any
2 such use occurred, which Answering Defendants deny but here assume only for the
3 sake of asserting this defense.

4 **TWELFTH AFFIRMATIVE DEFENSE**

5 **[Proof of Copying of Protectible Expression]**

6 193. The First Amendment to the United States Constitution requires that
7 Plaintiff must prove by clear and convincing evidence that Answering Defendants
8 have copied protectible expression from Plaintiff's Work.

9 **THIRTEENTH AFFIRMATIVE DEFENSE**

10 **[17 U.S.C. § 507]**

11 194. Plaintiff's purported claim and any prayer for relief are barred and/or
12 limited in whole or in part by the provisions of 17 U.S.C. § 507.

13 **FOURTEENTH AFFIRMATIVE DEFENSE**

14 **[Laches]**

15 195. Plaintiff's purported claims and any prayer for relief are barred by the
16 doctrine of laches.

17 **FIFTEENTH AFFIRMATIVE DEFENSE**

18 **[Proof of Allocating Defendant's Profits]**

19 196. The First Amendment to the United States Constitution requires that
20 Plaintiff, not Answering Defendants, should have the burden of proving by clear and
21 convincing evidence what portion, if any, of Answering Defendants profits that are
22 allocable to the alleged infringement by answering Defendants, or any of them.

23 WHEREFORE, Answering Defendants pray for relief as follows:

- 24 1. That the Complaint and each claim therein be dismissed without
25 prejudice;
26 2. That Answering Defendants recover their costs and reasonable attorneys'
27 fees; and
28

3. For such other and further relief as the Court deems proper.

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